



## CHAPTER TWO

### Charging Considerations

#### I. Offenses

At charging, prosecutors need to be fully aware of the elements of crimes and judicial interpretation of those elements. *See* GROOT *generally*. Judicial interpretation of the elements can significantly affect how a prosecutor elects to charge a crime. *See, e.g. Howard v. Commonwealth*, 221 Va. 904, 275 S.E.2d 602 (1981) (conduct for which defendant convicted held not to be covered by statutes charged). In addition to paying close attention to judicial interpretations of charging statutes, prosecutors must keep current with legislative changes. *See* Appendix A for the text of the basic Virginia child abuse charging statutes.

##### A. Sexual Offenses (GROOT at 423-445).

###### 1. Generally

To no one's surprise, the Virginia Court of Appeals has ruled that the Virginia sodomy statute is not unconstitutionally vague, and that the due process interest in privacy does not apply to non-consensual acts of sodomy with a 16-year-old girl. *Santillo v. Commonwealth*, 30 Va. App. 470, 517 S.E.2d 733 (1999). Likewise, convicting a defendant of committing oral sodomy on his 15-year-old nephew did not violate the uncle's rights to "the enjoyment of life and liberty" and to "pursuing and obtaining happiness." *Paris v. Commonwealth*, 35 Va. App. 377, 381, 545 S.E.2d 557, 558 (2001).

###### 2. Mental State

Proof of lascivious intent or intent to defile is necessary for convictions of many child sexual abuse offenses (*e.g.*, indecent exposure, indecent liberties, abduction with intent to defile). Proof of intent almost always will be based on circumstantial evidence and thus poses several difficulties. For example, in *McKeon v. Commonwealth*, 211 Va. 24, 175 S.E.2d 282 (1970), the court held that a man who exposed his genitals to a child 35 feet away did not violate Va. Code Ann. §18.1–214 (1950) (now Va. Code Ann. §18.2–370). The defendant claimed that he had a robe on, and that, although there was a breeze, he did not believe his privates became exposed. The child testified that the man was "smiling" and standing on his porch with his hands on his hips and his genitals exposed. The court said that even accepting the victim's testimony as true, the Commonwealth failed to prove lascivious intent:

[T]here is no evidence that the defendant was sexually aroused; that he made any gestures toward himself or to her; that he made any improper remarks to her; or that he asked her to do anything wrong. The fact that defendant told [the victim] to 'turn around' and that he was smiling at the time, when she was 35 feet away from him, is not proof beyond a reasonable doubt that he knowingly and intentionally exposed himself with lascivious intent. *Id.* at 27, 175 S.E.2d at 284.

However, where a defendant takes a five-year-old girl to a bathroom with him and removes his pants and under shorts, exposing his erect penis, he can be convicted of taking indecent liberties with the child. *Siquina v. Commonwealth*, 28 Va. App. 694, 508 S.E.2d 350 (1998). Likewise, where a defendant exposes his genitals in a visibly aroused state and is masturbating, the evidence is sufficient to support a conviction under Va. Code Ann. §18.2-387 for indecent exposure. *Morales v. Commonwealth*, 31 Va. App. 541, 525 S.E.2d 23 (2000); *Copeland v. Commonwealth*, 31 Va. App. 512, 525 S.E.2d 9 (2000). See also *Walker v. Commonwealth*, 12 Va. App. 438, 404 S.E.2d 394 (1991) (evidence sufficient to establish criminal intent in defendant's touching the vagina of the seven-year-old daughter of his girlfriend even though he claimed to be touching her to determine if she and some boys in the neighborhood had been "touching each other"); *Campbell v. Commonwealth*, 227 Va. 196, 313 S.E.2d 402 (1984) (evidence that man gestured to 8-year-old girl 87 feet away from him, pulled his pants down to his knees, then gestured again sufficient to establish lascivious intent); *Moore v. Commonwealth*, 222 Va. 72, 77, 278 S.E.2d 822, 825 (1981) (evidence sufficient to show defendant's lascivious intent in touching his penis to the victim's buttocks). But see *Hughes v. Commonwealth*, 16 Va. App. 576, 431 S.E.2d 906 (1993) (evidence that defendant commented about "nice looking women" at a party, that he talked to the victim and offered to take her and two small boys to the bathroom, and scientific evidence that the child was not wearing her coat when in car with defendant insufficient to prove intent to defile).

### 3. Conduct

#### a. Force

*Rape* (GROOT at 425–427). Psychological coercion may satisfy the element of intimidation in a rape case. *Sutton v. Commonwealth*, 228 Va. 654, 324 S.E.2d 665 (1985). In *Sutton*, the victim's uncle repeatedly attempted to rape the victim; the aunt told the victim each time that she should have submitted to him; the defendants threatened to send the victim back to her father who had a history of beating her; and the victim had a hearing disability for which she wore a hearing aid. The court held that defendants' conduct constituted intimidation under §18.2-61. Intimidation need not include overt threats—it may be caused by imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure. *Id.* at 661, 324 S.E.2d at 670. *Id.* See also *Bailey v. Commonwealth*, 82 Va. 107 (1886) (consent of 14-year-old stepdaughter induced by fear of bodily harm is not consent); *Myers v. Commonwealth*, 11 Va. App. 634, 400 S.E.2d 803 (1991) (37-year-old defendant's behavior in driving a 15-year-old victim to a remote area and telling her she would have to walk back if she did not "do something for him" constituted intimidation). In *Commonwealth v. Bower*, 264 Va. 41, 563 S.E.2d 736 (2002), the Virginia Supreme Court overturned the decision of the Court of Appeals reversing defendant's conviction of animate object sexual penetration of his thirteen-year-old daughter (36 Va. App. 382, 551 S.E.2d 1 (2001)), as the parent-child relationship itself is relevant to the possibility of intimidation and the harm inherent in a sexual assault itself is sufficient to constitute fear of bodily harm to support the

conviction. The Court of Appeals itself concluded in *Benyo v. Commonwealth*, 38 Va. App. 650, 568 S.E.2d 371 (2002), that the evidence was sufficient to convict defendant of raping his stepdaughter beginning when she was fifteen years old because of his intimidation through the use of psychological and emotional pressure.

*Aggravated Sexual Battery* (GROOT at 430-431). Fondling alone does not constitute aggravated sexual battery when there is no showing of serious injury or use of a weapon. *Johnson v. Commonwealth*, 5 Va. App. 529, 365 S.E.2d 237 (1988). In *Johnson*, the defendant lay down on a bed where the 15-year-old male victim was sleeping and touched the victim's buttocks and penis. The victim left the room as soon as he awoke. The court held that non-consensual touching alone does not constitute force within the meaning of the statute; to constitute aggravated sexual battery, there must be a showing of serious injury or use of a weapon. Because neither of these factors was demonstrated, the court reversed the defendant's conviction.

b. Penetration (GROOT at 424).

The element of penetration must be proven to support a forcible sodomy conviction, and such proof may be based solely on circumstantial evidence. *Martin v. Commonwealth*, 4 Va. App. 438, 358 S.E.2d 415 (1987) (victim's statements and testimony of medical expert sufficient to prove penetration). Proof of penetration of the victim's outer vaginal lips (labia majora) is sufficient. *Love v. Commonwealth*, 18 Va. App. 84, 441 S.E.2d 709, 711 (1994). Proof of penetration of the vaginal opening is not required. *Id.* But in *Moore v. Commonwealth*, 254 Va. 184, 491 S.E.2d 739 (1997), the Supreme Court of Virginia ruled that a young girl's testimony that defendant had placed his penis "on" her vagina was insufficient to prove penetration for the purpose of a prosecution for rape of a child under thirteen. *Id.* at 189, 491 S.E.2d at 741. Likewise, the Court of Appeals reversed the conviction of a defendant on multiple sex offenses with a ten-year-old girl in *Carter v. Commonwealth*, No. 2506-01-3 (Va. App. Oct. 29, 2002) (unpublished), where the testimony referred to defendant's tongue being placed "on" the girl's "private" because there was insufficient evidence to establish the penetration necessary to sustain the sodomy conviction. In a similar case, *Breeden v. Commonwealth*, No. 0404-02-3 (Va. App. Jan. 28, 2003) (unpublished), defendant was convicted of forcible sodomy and object sexual penetration of a nine-year-old victim by a jury. Although the victim's testimony about defendant's tongue licking her was not sufficient to establish the penetration sufficient to establish the offense of forcible sodomy, the medical evidence was sufficient to sustain the object sexual penetration conviction. Virginia courts also require proof of penetration in order to sustain a conviction for crimes against nature. *Ashby v. Commonwealth*, 208 Va. 443, 444, 158 S.E.2d 657, 658 (1968), *cert. den.*, 393 U.S. 1111 (1969) (evidence that a boy's mouth was placed on defendant's penis insufficient to show penetration). However, penetration is an issue for the finder of fact to determine. *Ryan v. Commonwealth*, 219 Va. 439, 444-45, 247 S.E.2d 698, 702 (1978) (jury finding that defendant's mouth penetrated victim's vagina not error).

c. Abduction (GROOT at 1–9).

The Commonwealth is not required to prove any carrying (“asportation”) of the victim to sustain a conviction for abduction; physical detention is sufficient. *Scott v. Commonwealth*, 228 Va. 519, 323 S.E.2d 572 (1984). See *Simms v. Commonwealth*, 2 Va. App. 614, 346 S.E.2d 734 (1986) (defendant properly convicted of abduction with intent to defile when he pulled a 16-year-old victim to the side of her house, told her to take her pants off, and threatened to kill her if she was not quiet). But see *Johnson v. Commonwealth*, 221 Va. 872, 275 S.E.2d 592 (1981) (defendant who seized a woman, made sexual advances and held her for 10 to 15 seconds did not abduct with intent to defile because the evidence was consistent with his intent to persuade her to engage in consensual intercourse). For other issues that have arisen in abduction with intent to defile cases, see *Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. den.*, 459 U.S. 1228, *reh’g den.*, 460 U.S. 1105 (1983) (upholding jury instruction that used the words “sexually molest” rather than “defile”); *Hughes v. Commonwealth*, 16 Va. App. 576, 431 S.E.2d 906 (1993) (evidence that defendant commented about “nice looking women” at a party, that he talked to the victim and offered to take her and two small boys to the bathroom, and scientific evidence that the child was not wearing her coat when in car with defendant insufficient to prove intent to defile); *Coram v. Commonwealth*, 3 Va. App. 623, 352 S.E.2d 532 (1987) (holding that convictions for attempted rape and abduction with intent to defile arising from one incident did not amount to double jeopardy).

d. Carnal Knowledge.

A defendant was properly convicted of carnal knowledge in *Shull v. Commonwealth*, 247 Va. 161, 440 S.E.2d 133 (1994), *aff’g* 16 Va. App. 667, 431 S.E.2d 924 (1993), for committing oral sodomy by placing her mouth on the penis of a fifteen-year-old boy.

e. Custody or Supervision of Child.

In *Krampen v. Commonwealth*, 28 Va. App. 163, 510 S.E.2d 276 (1999), the Court of Appeals concluded that the defendant could be convicted of taking indecent liberties with a child in violation of Section 18.2-370.1 of the Code (indecent liberties by a person in a custodial or supervisory relationship) because the mother’s entrustment of the victim to him for transporting her to and from church placed him in “a custodial or supervisory relationship.” Such status does not require any formal legal custodial relationship. Similarly, a therapist also was acting in such a capacity when he took sexually explicit photographs of a girl he was counseling during the time she was entrusted to his care. *DeAmicis v. Commonwealth*, 29 Va. App. 751, 514 S.E.2d 788 (1999). In *Woodson v. Commonwealth*, Record No. 140-98-2 (Va. App. Mar. 2, 1999) (unpublished), the court ruled that defendant was a “person responsible” for the victim’s care under Va. Code Ann. §18.2-371.1 where he lived in the same house and exercised authority over him and he thus could be convicted of neglecting the boy. However, in *Kisling v. Commonwealth*, Record No. 0169-98-3 (Va. App. Dec. 22, 1998) (unpublished), the court found insufficient proof

of a “custodial or supervisory relationship” where the seventeen-year-old victim was living as a guest in Kisling’s home without him having any legal or actual authority over the girl. Although the conviction was reversed on other grounds, the Court of Appeals ruled in *Quinones v. Commonwealth*, 35 Va. App. 634, 547 S.E.2d 524 (2001), that a step-grandfather could be tried as a “custodian.”

- B. Physical Abuse (Cruelty to Children, Va. Code Ann. § 40.1–103, and Abuse and Neglect of Children, Va. Code Ann. §18.2–371.1) (GROOT at 230-231).

For issues related to physical offenses against children, see *Christian v. Commonwealth*, 221 Va. 1078, 277 S.E.2d 205 (1981) (Commonwealth must prove beyond a reasonable doubt that the defendant was the only person who could have injured the child); *Lovisi v. Commonwealth*, 212 Va. 848, 188 S.E.2d 206 (1972), *cert. denied*, 407 U.S. 922 (1972) (Va. Code Ann. §40.1–103 applies to those standing in loco parentis at the time of the offense and is not limited to those having legal custody over a child); *Campbell v. Commonwealth*, 12 Va. App. 476, 405 S.E.2d 1 (1991) (bruises on three-year-old sufficient evidence to show requisite intent under malicious wounding statute); *Diehl v. Commonwealth*, 9 Va. App. 191, 385 S.E.2d 228 (1989) (felony abduction, Va. Code Ann. § 18.2–47, may be used against a non-custodial parent as the underlying felony in a felony murder prosecution). See also part V., *supra*. In *Snow v. Commonwealth*, 33 Va. App. 754, 537 S.E.2d 6 (2000), the court ruled that defendant could be convicted of child cruelty as a “person responsible for the care of a child” in engaging in a high speed attempt to evade the police with several children under eighteen in the automobile. He voluntarily took control of the car and drove away from the police knowing that the children were in the vehicle. However, in *Commonwealth v. Carter*, 21 Va. App. 150, 462 S.E.2d 582 (1995), the Court of Appeals ruled that a defendant could not be prosecuted under Va. Code Ann. §40–103 for placing children “in a situation that their life, health, or morals may be endangered” through driving under the influence of alcohol because a clause of the statute was unconstitutionally vague. *Id.* at 155, 462 S.E.2d at 585. In another case decided a year later, *Mosby v. Commonwealth*, 23 Va. App. 53, 473 S.E.2d 782 (1996), the court upheld the constitutionality of a different, but similar, clause in the same statute in a case where a child was injured in an automobile accident where his mother had been driving while drinking, although the conviction was overturned because the jury was instructed on simple negligence.

The Court of Appeals ruled in *Ellis v. Commonwealth*, 29 Va. App. 548, 513 S.E.2d 453 (1999), that a mother could not be convicted of criminal neglect where she left her two young children alone napping in an apartment to visit a friend for thirty minutes in another apartment and the girls were injured in a fire because the mother left the gas stove on. There was no proof of the requisite criminal intent to support the convictions. However, in *Roberts v. Commonwealth*, Record No. 1594-98-3 (Va. App. June 8, 1999) (unpublished), the court found that the evidence of felony child neglect was sufficient where the mother neglected to get necessary medical treatment for her four-year-old child when he had serious physical injuries, in spite of her claim that she lacked criminal intent because she feared her boyfriend. On the other hand, the Court of Appeals reversed a similar conviction where a mother failed to take her son to get medical attention when she saw

injuries suffered while with a babysitter. *McBeth v. Commonwealth*, Record No. 1096-98-2 (Va. App. June 29, 1999) (unpublished).

C. Pornography Offenses (Va. Code Ann. §§18.2–374.1 and -374.1:1) (GROOT at 384-386).

1. Constitutionality

The Virginia Supreme Court has upheld the constitutionality of Va. Code Ann. §18.2–374.1 (1979 version). *Freeman v. Commonwealth*, 223 Va. 301, 309–13, 288 S.E.2d 461, 465–67 (1982). In *Freeman*, the court held that the statute was not overbroad because its incidental effect on speech was minor relative to the need to control behavior that harms children. *Id.* at 309, 288 S.E.2d at 465. The court also held that the statute’s prohibition of “obscene” material was not unconstitutionally vague. *Id.* at 312, 288 S.E.2d at 466-67. *See also Foster v. Commonwealth*, 6 Va. App. 313, 369 S.E.2d 688 (1988) (the language “obscene for children” in the 1979 version of Va. Code Ann. §18.2–374.1 was severable from the definition of “sexually explicit material” and therefore any constitutional infirmities in the “obscene for children” language would not affect the conviction).

2. Elements.

*Intent.* A person charged with enticing a person to be a subject of sexually explicit material under §18.2–374.1(B)(1) must have the intent to cause the victim to be the subject of sexually explicit material. Actual publication of materials is not necessary for a conviction; because the crime covers soliciting or encouraging children to appear in sexually explicit material, a person may be convicted if the evidence shows defendant’s intent is to produce sexually explicit material even though nothing is actually produced. *Frantz v. Commonwealth*, 9 Va. App. 348, 354, 388 S.E.2d 273, 276-77 (1990).

The Court of Appeals provided a thorough discussion of intent in *Foster v. Commonwealth*, 6 Va. App. 313, 369 S.E.2d 688 (1988). In *Foster*, a defendant charged with four counts under §18.2-374.1(B)(1) argued that the evidence failed to prove his intent. In the first count, the court upheld the conviction because there was evidence that the defendant showed the victim pictures of genitalia of other children, told the victim not to tell anyone, asked the victim to model as if she were dead, and asked the victim to accompany him as he took pictures of dead children. *Id.* at 327, 369 S.E.2d at 696–97. However, in the remaining counts, the evidence was insufficient because it failed to show an intent to cause the children to be the subjects of sexually explicit material. The evidence demonstrated the following acts by the defendant: i) he showed one victim how to massage the arm of a dead person in order to be able to move it into different positions. He also took pictures of the victim in a bathing suit and showed her pictures he had taken of nude children. However, he did not ask the victim to model and the pictures he took were not sexually explicit. *Id.* at 328, 369 S.E.2d at 697; ii) he asked another victim to model clothing for dead people and wrote in his records that he intended to take close-up pictures of her exposed nipples. The court said that pictures of nipples were not “lewd” within the meaning of the statute. *Id.* at 329, 369 S.E.2d at 697–98; and iii) the defendant

had a victim lie on a bed pretending to be dead, he took her measurements for burial clothes, and he showed her photographs of models dressed in see-through nightgowns, telling her that was what she would be doing. The court found this to be insufficient evidence to prove an intent to cause her to be the subject of sexually explicit photographs. *Id.* at 329–30, 369 S.E.2d at 698.

*Sexually Explicit Visual Material.* In prosecuting a case under §§18.2–374.1 or 374.1:1, the Commonwealth must prove that visual representations of children are “sexually explicit.” The Court of Appeals defined what constitutes sexually explicit material in *Frantz v. Commonwealth*, 9 Va. App. 348, 388 S.E.2d 273 (1990). In *Frantz*, the defendant took pictures of teenage boys standing in the nude; on one occasion he removed all his clothes while taking the pictures and on another occasion he masturbated while taking pictures of a nude boy. The court held that the defendant’s sexual arousal was irrelevant to determining whether the pictures were sexually explicit, and because there was no evidence that “the boys assumed erotic or provocative poses,” the photographs were not sexually explicit. *Id.* at 353–54, 388 S.E.2d at 276.

Section 18.2-374.3 is a far more important section of the Code now because of the greater use of electronic means, including computers, computer networks, and computer bulletin boards, to promote activities forbidden by Va. Code Ann. §18.2–374.1.

#### D. Attempts (GROOT at 44-51).

While punishment for attempts are codified in Va. Code Ann. §§18.2–25 to 18.2–29, the definition of an attempt is guided by case law. *Johnson v. Commonwealth*, 209 Va. 291, 163 S.E.2d 570 (1968). Two elements must be shown in the prosecution of any attempted offense: i) specific intent to commit the crime; and ii) an overt act made toward the commission of the crime. *Thacker v. Commonwealth*, 134 Va. 767, 114 S.E. 504 (1922); *Hicks v. Commonwealth*, 86 Va. 223, 9 S.E. 1024 (1889).

##### 1. Specific Intent

Specific intent may be inferred from “conduct consistent with preparation for [the crime].” *Fortune v. Commonwealth*, 14 Va. App. 225, 229, 416 S.E.2d 25, 27 (1992). In *Fortune*, for example, the court cited as conduct consistent with the crime of rape: “shoving a victim onto a bed, telling a victim to lie down, removing or attempting to remove a victim’s outer clothing or underclothing, often while the defendant is removing or loosening his own clothing.” *Id.*

Likewise, in *Tharrington v. Commonwealth*, 2 Va. App. 491, 346 S.E.2d 337 (1986), defendant’s acts demonstrated his intent to sexually abuse the victim. In this case, defendant had an 11-year-old friend of his daughter try on some pants. Once she had the pants on, the defendant locked her in a room with him, telling the victim he wanted her to see how the clothes fit. He asked her to pull the pants down to her thighs while he felt the waistband of the pants. The defendant told her he liked her underpants. Next, the defendant had the victim unbutton her shirt while he felt the inside of the shirt. Finally, the defendant sat in front of

the victim, asked her repeatedly if he could touch her, and offered her money to let him. The court held that these acts demonstrated an intent to touch the victim's intimate parts or the clothing covering her intimate parts. In *Penley v. Commonwealth*, Record No. 188-97-2 (Va. App. Sept. 8, 1998) (unpublished), the Court of Appeals concluded that the evidence was sufficient to establish Penley's guilt of attempted taking of indecent liberties with children where he asked two girls awaiting their school bus if they had "ever seen a dick before" and if they "would like to see one." See also *Green v. Commonwealth*, 223 Va. 706, 292 S.E.2d 605 (1982) (specific intent found); *Chittum v. Commonwealth*, 211 Va. 12, 174 S.E.2d 779 (1970) (specific intent found); *Ingram v. Commonwealth*, 192 Va. 794, 66 S.E.2d 846 (1951) (specific intent found); *Granberry v. Commonwealth*, 184 Va. 674, 36 S.E.2d 547 (1946) (specific intent found).

## 2. Overt Act

An overt act toward the commission of the offense must go beyond mere preparation. *Fortune*, *supra*, 14 Va. App. at 230, 416 S.E.2d at 28. However, "where intent has been shown, any slight act done in furtherance of this intent will constitute an attempt." *Id.* In *Fortune*, the defendant's acts of taking off his pants, forcibly keeping the victim in a room, and touching her breast went beyond mere preparation. *Id.* See also *Tharrington v. Commonwealth*, 2 Va. App. 491, 496, 346 S.E.2d 337, 340 (1986) (overt acts found when defendant took victim into a locked room, asked her to undress herself, and repeatedly asked her if he could touch her). But see *Previtere v. Commonwealth*, 16 Va. App. 809, 433 S.E.2d 515 (1993) (defendant's persistence, the circumstances of time, place and relative age, and defendant's personal relationship with victim did not show an overt act).

## E. Principals and Accessories (Va. Code Ann. §§18.2-18 to 18.2-21) (GROOT at 390-396).

*Principal in the Second Degree.* A person must satisfy three elements to be a principal in the second degree: i) the offense must be committed by a principal in the first degree; ii) the defendant must have been actually or constructively present when the offense was committed; and iii) the defendant must have "procured, encouraged, countenanced, or approved" the commission of the crime. *Sutton v. Commonwealth*, 228 Va. 654, 324 S.E.2d 665 (1985). In *Sutton*, the court held that a woman who repeatedly pressured a victim to have intercourse with a man could be convicted of rape as a principal in the second degree. First, the fact that the defendant could not have committed the offense did not "absolve her of criminal liability for aiding and abetting" her husband. *Id.* at 665, 324 S.E.2d at 671. Second, the defendant was in another room in the house when the intercourse occurred, where her "malevolent, intimidating influence on her niece was present and continued unabated." This conduct amounted to constructive presence. *Id.* at 666, 324 S.E.2d at 672. Third, the defendant assisted in the entire scheme of coercing the victim into having intercourse with her husband. Thus, the conviction was proper.

*Innocent Agent.* Under an earlier version of section 18.2-61, the Virginia Supreme Court held that rape could not be committed through an innocent agent. *Dusenbery v. Commonwealth*, 220

Va. 770, 263 S.E.2d 392 (1980) (defendant forced a 16-year-old boy to have intercourse with a 16-year-old girl by grabbing the boy's penis and attempting to force the boy to penetrate the girl). However, the General Assembly amended the statute following the *Dusenbery* case to include activity that "causes a complaining witness" to engage in the activity. Va. Code Ann. §18.2-61.

## **II. The Charging Documents (BACIGAL at 13-1 through 13-8).**

### **A. Specificity**

An indictment does not have to specify the exact date of the offense when time is not of the essence. Va. Code Ann. §19.2-226(6). Time is not of the essence in rape cases unless the age of the child at the time of the offense is an issue. *Clinebell v. Commonwealth*, 3 Va. App. 362, 349 S.E.2d 676 (1986), *rev'd on other grounds*, 235 Va. 319, 368 S.E.2d 263 (1988) (sufficient to specify a 13-month period within which a crime occurred); *see Waitt v. Commonwealth*, 207 Va. 230, 148 S.E.2d 805 (1966) (indictment stating that offense occurred within 16 months prior to indictment sufficient); *Marlowe v. Commonwealth*, 2 Va. App. 619, 347 S.E.2d 167 (1986) (failure to specify date when defendant asserted an alibi defense did not violate due process).

### **B. Number of Counts**

Supreme Court Rule 3A:6(b) states:

Two or more offenses, any of which may be a felony or misdemeanor, may be charged in separate counts of an indictment or information if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan.

The Court of Appeals analyzed this rule in the child abuse context in *Foster v. Commonwealth*, 6 Va. App. 313, 369 S.E.2d 688 (1988). In *Foster*, the defendant asked several children to pose nude in various situations, most of which involved acting like they were dead. The court held that the counts were misjoined because: i) a three year gap between some of the incidents indicated they were not part of a "common scheme or plan;" and ii) the conduct in one count involved activity that did not occur in any of the other counts (binding and photographing a victim). *Id.* at 322-23, 369 S.E.2d at 694. The court then analyzed four separate counts and found harmless error in joining these counts related to defendant's attempts to entice young girls to be photographed in casket. Because all of these acts would have been admissible in separate trials as prior crimes, it was not reversible error to join all four counts in one trial. *Id.* at 323-24, 369 S.E.2d at 695.

## **III. Time Considerations.**

### **A. Statutes of Limitation (Va. Code Ann. §19.2-8) (BACIGAL at 14-9).**

With the exception of marital rape, Va. Code Ann. §18.2-61 and marital sexual assault, Va. Code Ann. §18.2-67.2:1, there is no statute of limitations on felony charges in Virginia. Further, Va. Code Ann. §19.2-8 places a one year limitation on the prosecution of most misdemeanor charges; misdemeanors related to child abuse fall under this limitation.

B. Speedy Trial and Due Process (Va. Code Ann. §19.2-243) (BACIGAL at 14-10 through 14-12).

Virginia's speedy trial requirements, Va. Code Ann. §19.2-243, are listed in Appendix B. None of the issues raised in the statute are necessarily unique to child abuse cases. However, one issue that does arise frequently, given the length of delay in some reports of child abuse, is whether a delay of several years violates constitutional speedy trial or due process requirements. Speedy trial guarantees apply only *after* a defendant is charged or indicted. *United States v. Marion*, 404 U.S. 307 (1971). Therefore, a delay caused by the victim's failure to report does not trigger a speedy trial analysis. However, such a delay conceivably can affect the defendant's right to a fair trial, thus implicating due process concerns. The Virginia Supreme Court has addressed the issue and established a two-step analysis. In order for a pre-indictment delay to violate due process, there must be a showing of intentional delay by the prosecutor *and* actual prejudice to the defendant. *Hall v. Commonwealth*, 8 Va. App. 526, 383 S.E.2d 18 (1989) (a 13-year pre-indictment delay in first degree murder case did not deny the defendant due process).

The Court of Appeals has held in a child abuse context that a lengthy pre-indictment delay did not violate due process. *Johnson v. Commonwealth*, 9 Va. App. 176, 385 S.E.2d 223 (1989). In *Johnson*, the defendant was indicted in 1986 for sexual contact with minors that occurred from 1973 to 1982. Law enforcement officials first received information about the incidents in 1986 and an indictment was returned about six months later. The defendant argued that once he established prejudice, the burden shifted to the Commonwealth to prove that unfair tactics were not used. *Id.* The court did not reach this argument because it found the defendant's claim that his memory had faded, did not by itself demonstrate actual prejudice. Therefore, the pre-indictment delay did not warrant dismissal of the charges. In *Ashby v. Commonwealth*, 33 Va. App. 540, 535 S.E.2d 182 (2000), the Court of Appeals ruled that when an indictment is "nol prossed" and a new indictment issued, the speedy trial period begins anew.

#### IV. Lesser Included Offenses

An indictment can be considered to be charging a lesser offense within the one charged if all of the elements of the lesser offense are included in the greater. *Ashby v. Commonwealth*, 208 Va. 443, 444-45, 158 S.E.2d 657, 658 (1968), *cert. denied*, 393 U.S. 1111 (1969). "An offense is not lesser-included within another . . . if it contains at least one necessary element not required to prove the other." *Howard v. Commonwealth*, 221 Va. 904, 275 S.E.2d 602 (1981). Stated differently, the rule is: "[I]n order for one crime to be a lesser included offense of another crime, every commission of the greater offense must also be a commission of the lesser offense." *Kauffmann v. Commonwealth*, 8 Va. App. 400, 409, 382 S.E.2d 279, 283 (1989). The following child abuse-related offenses have been held *not* to be included within a greater offense:

- Carnal knowledge is not a lesser included offense of rape. *Ragsdale v. Commonwealth*, 38 Va. App. 421, 565 S.E.2d 331 (2002).
- Indecent liberties with a child, contributing to the delinquency of a minor, and sexual battery are not lesser included offenses of aggravated sexual battery. *Kauffmann, supra*, 8 Va. App. at

409–10, 382 S.E.2d at 283–84. In *Kauffmann*, the court stated that the difference between aggravated sexual battery and sexual battery was the age of the victim. “Since the evidence would not support a finding that [the victim] was not between thirteen and fifteen years of age, it being uncontradicted that she was fourteen, a sexual battery instruction would have been inappropriate in this case.” *Id.* Cf. *Walker v. Commonwealth*, 12 Va. App. 438, 404 S.E.2d 394 (1991) (an indictment was broadly enough drawn that a conviction for sexual battery was “substantially charged” and therefore proper even though it is not a lesser included offense of aggravated sexual battery, which was the crime charged).

- Contributing to the delinquency of a minor is not a lesser included offense of statutory rape. *Commonwealth v. Brew*, 43 Va. Cir. 611 (Richmond County 1996).
- Fondling or feeling a child’s breast with lascivious intent is not a lesser included offense of attempted sodomy. *Howard v. Commonwealth*, 221 Va. 904, 275 S.E.2d 602 (1981).
- Attempted rape is not a lesser included offense of abduction with intent to defile. *Simms v. Commonwealth*, 2 Va. App. 614, 346 S.E.2d 734 (1986); *Coram v. Commonwealth*, 3 Va. App. 623, 352 S.E.2d 532 (1987).
- Indecent exposure is not a lesser included offense of sodomy. *Ashby v. Commonwealth*, 208 Va. 443, 158 S.E.2d 667 (1968), *cert. denied*, 393 U.S. 1111 (1969).

The following case *has* found a lesser included offense:

- Simple abduction is a lesser included offense of abduction with intent to defile. *Hawks v. Commonwealth*, 228 Va. 244, 321 S.E.2d 650 (1984).

## V. Use of Circumstantial Evidence in Child Physical Abuse and Homicide Cases

### A. Generally (GROOT at 271–274).

*First Degree Murder.* (Va. Code Ann. §18.2–32). Virginia courts look primarily to five factors in determining whether circumstantial evidence is sufficient to support a finding of a premeditated intent to kill. *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882 (1982). The factors are: the brutality of the attack, the disparity in size and strength between the defendant and the victim, the concealment of the victim’s body, the defendant’s lack of remorse and efforts to avoid detection, and motive. *Id.* at 232, 294 S.E.2d at 892-93. These factors were applied to a child abuse context in *Rhodes v. Commonwealth*, 238 Va. 480, 384 S.E.2d 95 (1989). In *Rhodes*, a three-month-old infant died of what an expert identified as head injuries caused by “moderate to severe force” from a blunt instrument. The infant also had one old bruise behind her ear and a leg fracture that was at least two weeks old. In analyzing whether the circumstantial evidence demonstrated a premeditated intent to kill, the court determined that three of the *Epperly* factors had not been met: i) the defendant did not attempt to conceal the crime, ii) she showed remorse, and iii) she had no motive. The court stated it was not using the *Epperly* factors as a litmus test, stating that circumstantial evidence may indicate intent “whenever [the court] can say that the reasonable import of [the] evidence, considered as a whole, is sufficient to show beyond a reasonable doubt

that the accused was the criminal agent and he acted with a premeditated intent to kill.” *Id.* at 487, 384 S.E.2d at 99. *See also Biddle v. Commonwealth*, 206 Va. 14, 141 S.E.2d 710 (1965) (first degree murder conviction reversed because evidence did not show a willful or malicious act by mother who failed to feed her three month old baby during times when she and her husband were not getting along); *Vaughan v. Commonwealth*, 7 Va. App. 665, 376 S.E.2d 801 (1989) (evidence insufficient to support first degree murder conviction of 16-year-old mother who kept her pregnancy a secret, failed to take steps toward placing the baby for adoption, disposed of the baby’s body, and did not suffer from a mental illness).

The Court of Appeals upheld a first degree murder conviction for the death of a child in *Archie v. Commonwealth*, 14 Va. App. 684, 689, 420 S.E.2d 718, 721 (1992), in which four of the five *Epperly* elements were shown. First, an expert testified that the victim died from substantial and repeated blows to the head by a flat object. Second, the defendant was a grown woman and the victim was a three-year-old child. Third, several witnesses testified as to the defendant’s lack of remorse after the incident. Fourth, there was evidence that the defendant was angry with the victim and with the victim’s mother, which provided a motive. The only element that did not exist was an effort to conceal the body. However, the existence of four of the five factors was sufficient to demonstrate the defendant’s premeditated intent to kill. *Id.* at 689-91, 420 S.E.2d at 722. *See* Charles A. Phipps, “Proving Criminal Intent in Cases of Child Homicide,” 11 *Update*, No. 1 (1998).

*Second Degree Murder.* (Va. Code Ann. §18.2-32). The Virginia Supreme Court held circumstantial evidence sufficient to prove malice in *Pugh v. Commonwealth*, 223 Va. 663, 292 S.E.2d 339 (1982). The child was malnourished, had been repeatedly beaten, and died after the defendant poured black pepper down the child’s throat to the point that it suffocated her. The court stated that the acts of abuse by the defendant were “wholly unreasonable, and beyond all proportion to any ordinary response to the conduct of a recalcitrant three-year-old.” *Id.* *See also Evans v. Commonwealth*, 215 Va. 609, 212 S.E.2d 268 (1975) (evidence of victim’s bruises, defendant’s statement that he had no love for the child, and an expert’s testimony that the child’s injuries were caused by blunt trauma constituted sufficient evidence to support a conviction for second degree murder). In *Smith v. Commonwealth*, No. 2284-01-1 (Va. App. Nov. 5, 2002) (unpublished), the evidence was sufficient to find Smith guilty of second-degree murder and child neglect in the death of her newborn infant by blunt force head injuries where she had gone to the hospital complaining of vaginal bleeding, stated that she had thought she had a fibroid tumor but had discovered a few days prior that she was pregnant, and that she had given birth but did not want her mother to know. The infant was found in her backyard, wrapped in some clothing near the trash cans and he died a few days later from the head injuries and abandonment. Likewise, in *Corrales v. Commonwealth*, No. 2737-01-2 (Va. App. Nov. 19, 2002) (unpublished), defendant was convicted of the second degree murder of her newborn baby where the baby was found in a closet in a double-tied plastic bag dead from asphyxiation. In *Pavlick v. Commonwealth*, 27 Va. App. 219, 497 S.E.2d 920 (1998) *reversing* 25 Va. App. 538, 489 S.E.2d 72 (1997), a child died at two months old of head injuries as a result of the “shaken baby syndrome,” and the father

was convicted of the second degree murder of the infant. The *en banc* Court of Appeals decided the trial court did not err in admitting evidence of rib fractures between two to four weeks old and a separate head injury that occurred about four to eight days before the death. The prior injuries occurred during a time when either Pavlick had sole physical custody of the infant or when the paternal grandmother was present, and she testified without contradiction that she had never shaken the infant. The evidence of the prior injuries was relevant and the jury was entitled to consider the evidence in determining the credibility of the witnesses. Similarly, in *Webber v. Commonwealth*, 26 Va. App. 549, 496 S.E.2d 83 (1998), the evidence was deemed sufficient to prove that a father had murdered his twenty-nine-day-old son where the medical symptoms were consistent with the “shaken baby syndrome” and where that diagnosis was coupled with the father’s inculpatory admissions.

*Involuntary Manslaughter.* In *Dowden v. Commonwealth*, 260 Va. 459, 536 S.E.2d 437 (2000), the circumstantial evidence that defendant was responsible for the blunt trauma fatal injuries to his seven-month-old son was sufficient to support his conviction for involuntary manslaughter. The only other possible explanation for the injuries was the administration of CPR during efforts to resuscitate the infant but the expert evidence negating that theory was overwhelming. Similarly, in *Collado v. Commonwealth*, 33 Va. App. 356, 533 S.E.2d 625 (2000), the evidence to support defendant’s conviction for child abuse through the “shaken baby syndrome” was sufficient in light of her sole custody of the child as a daycare provider during the day when the injuries occurred and the expert testimony regarding the time of the injuries and the symptoms. In *Craig v. Commonwealth*, 34 Va. App. 155, 538 S.E.2d 355 (2000), defendant was properly convicted of involuntary manslaughter in a trial for second degree murder for the death of his daughter as the result of “shaken baby syndrome,” and the Commonwealth, as well as a defendant, may request an instruction on the lesser-included offense of involuntary manslaughter in such a case.

*Child Physical and Sexual Abuse.* The Court of Appeals has found circumstantial evidence sufficient to prove a defendant’s intent to maliciously wound a child under Va. Code Ann. §18.2–51 in *Campbell v. Commonwealth*, 12 Va. App. 476, 405 S.E.2d 1 (1991). The court in *Campbell* stated:

The finder of fact may infer that a person intends the natural and probable consequences of his acts. . . . Thus, if a person intentionally takes an action, the probable consequence of which is the permanent disability of another, even if permanent disability does not result, he or she can be found to have intended to cause a permanent disability. *Id.* at 484, 405 S.E.2d at 5.

The court held that the trier of fact could infer from the serious nature and location of the blows to the child’s body that the defendant intended to permanently disfigure the child, even though permanent disfigurement did not occur. *Id.* See *Christian v. Commonwealth*, 221 Va. 1078, 277 S.E.2d 205 (1981) (two-year-old victim’s burns, bruises and fractures supported finding of criminal intent to injure under Va. Code Ann. §18.2–51). The Court of Appeals ruled in *Patrick v. Commonwealth*, 27 Va. App. 655, 500 S.E.2d 839 (1998), that the circumstantial evidence of penetration was sufficient to support a conviction of statutory rape of an eleven-year-old girl.

Since DNA evidence was introduced based on semen found in the girl's vagina, it was deposited there when defendant raped the victim, "which required him to penetrate victim's vagina with his penis." *Id.* at 663, 500 S.E.2d at 843. *See also Morrison v. Commonwealth*, 10 Va. App. 300, 391 S.E.2d 612 (1990) (although victim never testified that penetration occurred, doctor's testimony that some object penetrated her vagina was sufficient).

B. Corpus Delicti (GROOT at 260-265).

In every prosecution for homicide, the Commonwealth must prove corpus delicti. *Lane v. Commonwealth*, 219 Va. 509, 514, 248 S.E.2d 781, 783 (1978). The doctrine of corpus delicti requires first, proving a death occurred and second, proving the death was the result of the criminal act or agency of another. *Opanowich v. Commonwealth*, 196 Va. 342, 83 S.E.2d 432 (1954) (evidence sufficient to support second degree murder conviction when the baby did not die of natural causes, the defendant was the only person to have contact with the child, and the defendant had stated that she wanted to get rid of the child). Corpus delicti may be proven by circumstantial evidence. *Id.* In *Griffin v. Commonwealth*, Record No. 0855-99-2 (Va. App. Oct. 17, 2000) (unpublished), the court found that although Griffin had confessed to sexual offenses against his six-year-old daughter, there was not even the "slight corroborative evidence" to establish the *corpus delicti* of the offense and justify the conviction.

In cases involving the death of a newborn, the doctrine of corpus delicti requires the Commonwealth to prove that the newborn achieved an independent and separate existence apart from its mother before its death. *Lane v. Commonwealth*, 219 Va. 509, 514, 248 S.E.2d 781, 783 (1978). In *Lane*, the 17-year-old defendant testified she did not know she was pregnant until giving birth to her child in a toilet. After giving birth, she wrapped the infant in a towel, put the baby into a large plastic garbage bag, and put the bag off the side of a road. Several doctors testified at the trial that the death resulted from a severe lack of oxygen, but they could not state the cause of death with any reasonable degree of medical certainty. The Supreme Court held that evidence showing the child breathed a few times after birth was not an unqualified opinion that the child had acquired an independent existence separate from its mother. *Id.* at 514, 248 S.E.2d at 784. The court further stated it could not be inferred from the evidence that the death was caused by wrapping the child in a towel or placing it in the plastic bag. *Id.* at 515, 248 S.E.2d at 784. Thus, the evidence was insufficient to show beyond a reasonable doubt that the child's death was caused by a criminal act of the defendant.